BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NATHANIEL B. KRUGJOHN Claimant	)	
VS.	)	
STAFFMARK Respondent	)	Docket No. 1,052,275
AND	)	
NEW HAMPSHIRE INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requests review of the January 26, 2011 preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard.

ISSUES

On August 13, 2010, a forklift caught claimant's left foot, pulled him down, and rolled over his left ankle. Respondent contends it does not owe claimant workers compensation benefits as the accident resulted from claimant's horseplay. In short, respondent maintains claimant's accident did not arise out of his employment.

Claimant maintains the evidence is uncontradicted that horseplay had become a regular incident of the employment, had been condoned by his supervisors and, therefore, claimant's accident is compensable under the Workers Compensation Act.

Following a preliminary hearing, the ALJ awarded claimant both medical benefits and temporary total disability benefits after finding that claimant's supervisors had

consistently neglected company rules against horseplay; had created an "Animal House" atmosphere in the warehouse; and had implicitly authorized the horseplay.[1]

The only issue before the Board on this appeal is whether claimant's accident arose out of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was employed by respondent, a temporary employment agency, and worked at the Coleman Distribution Center warehouse in Gardner, Kansas. At the time of the accident, claimant was supervised by Coleman employees although respondent had recently placed an on-site manager at the distribution center, which utilized approximately 160 of respondent's employees.

There is no dispute that claimant was injured on March 13, 2010, when a forklift rolled over his left ankle while he was horsing around with a co-worker. Following the accident, claimant could not walk. He was taken by ambulance to the Olathe Medical Center, where he underwent surgery and was hospitalized for three days.

As indicated above, the question on this appeal is whether claimant's accident arose out of his employment. Before an accident is compensable under the Workers Compensation Act, the accident must, among other things, arise out of the employment.[2] The phrase 'arising out of' implies some causal connection between the accidental injury and the employment; namely, the injury must arise out of the nature, conditions, obligations or incidents of the employment. In *Coleman*, the Kansas Supreme Court summarized these concepts, as follows:

> We first observe that the Workers Compensation Act covers only personal injuries by "accident arising out of and in the course of employment." K.S.A. 2005 Supp 44-501. The phrase "in the course of' employment relates to time, place and circumstances under which the accident occurred, and requires that the injury happen while the employee is at work in his or her employer's service. *Siebert v. Hoch,* 199 Kan. 299, Syl. 2, 428 P.2d 825 (1967). . . .
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> The phrase "arising out of' implies some causal connection between the accidental injury and the employment. *Rush v. Empire Oil & Refining Co.,* 140 Kan. 198, Syl. 1, 34 P.2d 542 (1934). An injury is compensable if it arises out of the

[1] ALJ Order (Jan. 26, 2011 at 1).

[2] See K.S.A. 44-501(a).

> "nature, conditions, obligations and incidents of the employment." *Siebert v. Hoch,* 199 Kan. 299, Syl. 4, 428 P.2d 825 (1967).[3]

Generally, injuries from horseplay are not compensable under the Workers Compensation Act as they do not arise out of the employment or the worker's assigned duties. But there are exceptions. One such exception is when the employer is either aware of the activity or the activity has become commonplace, in essence placing the employer on constructive notice of its practice and destructive potential. In *Coleman*, the Kansas Supreme Court noted, in part:

> . . . The rule is clear, if a bit decrepit and unpopular: An injury from horseplay does not arise out of employment and is not compensable unless the employer was aware of the activity or it had become a habit at the workplace – in essence, placing the employer on constructive notice of its practice and destructive potential. . . . [4]

Claimant, who had worked for respondent less than one year at the time of his accident, described many instances of horseplay at work that his supervisors either instigated or *at the very least* were aware of. A common prank involved sneaking up on the forklift drivers and shutting off the fuel line. Another prank involving the forklifts was disabling their controls. Indeed, claimant was injured while trying to tape a forklift's controls. Video of the incident shows claimant immediately to the side of the forklift when he falls to the floor. It is difficult to discern, however, if claimant fell because the forklift turned into him or it caught his leg.

Shortly before the accident, claimant had attended a safety meeting conducted by Coleman regarding horseplay. Nonetheless, this record establishes that horseplay was commonplace in the warehouse area where claimant worked and that activity was condoned by his supervisors. Accordingly, in this instance the undersigned finds that horseplay had become a regular incident of claimant's employment and, therefore, the August 2010 accident arose out of his employment.

In summary, the preliminary hearing Order should be affirmed as claimant's accident is compensable under the Workers Compensation Act.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[5] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as

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[3] *Coleman v. Swift-Eckrich*, 281 Kan. 381, 383, 130 P.3d 111 (2006).

[4] *Id.* at 385.

[5] K.S.A. 44-534a.

permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated January 26, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2011.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge